BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 24.29.1409, relating to travel expense reimbursement for workers' compensation medical services	)))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On July 28, 2005, the Department of Labor and Industry published MAR Notice No. 24-29-197 regarding the public hearing on the proposed amendment of ARM 24.29.1409 relating to travel expense reimbursement for workers' compensation medical services at page 1350 of the 2005 Montana Administrative Register, Issue no. 14.

2. On August 18, 2005, the Department held a public hearing in Helena regarding the above-stated rule at which oral comments were received. Additional written comments were received prior to the closing date of August 26, 2005.

3. The Department has thoroughly considered the comments and testimony received. The following is a summary of the comments received and the Department's response to those comments:

Comment 1: The Montana Contractor Compensation Fund and the Montana Self-Insurers Association commented that the rule should clarify that a claimant's physician must indicate the appropriate form of travel for a claimant's medical condition for travel reimbursement purposes, if the least costly form of travel is not suitable for the claimant's medical condition.

Response 1: The Department agrees that for travel expense reimbursement purposes, the claimant's physician should indicate the form of travel necessary for a claimant's medical condition if the least costly form of travel is not suitable. The Department is revising the rule, as indicated below in this notice, to require that the type of travel selected by a claimant must be the least costly form of travel unless the travel is not suitable for the claimant's medical condition, as certified by the claimant's physician.

Comment 2: The Montana Self-Insurers Association and the Montana Contractor Compensation Fund commented that the requirement for travel expense reimbursement is an atypical insurance benefit, that the additional cost of travel reimbursement will impact the overall cost of workers' compensation premiums, and finally, that Montana's geographic population distribution and the medical expertise geographic distribution create situations where the travel expense is substantial. The Montana Self-Insurers Association also commented that it was in the interest of all parties for the rule to define reimbursement specifically so as to make claimants

aware of the benefits and insurers aware of the costs. The Montana Self-Insurers Association noted that changing the definition of community from 30 to 15 miles would increase insurers' costs.

Response 2: The Department acknowledges the comments. The decision to reimburse workers' compensation claimants for travel expenses related to medical treatment was made by the Legislature and is codified at 39-71-704, MCA. One of the Department's goals in promulgating the current amendments to the travel rule is to eliminate the administrative costs created due to discrepancies between statute and administrative rule. Travel reimbursement under current statutory language establishes the insurer is not liable for the first 100 miles per month, nor is the insurer liable for travel to medical treatment within the injured worker's community. The Department believes the rule is sufficiently specific to make costs and benefits clear to all parties. Finally, the Department amended the original proposed rule from 30 to 15 miles in response to earlier comments that claimants could travel up to 700 miles a month without reimbursement in some parts of the state if the claimant needed to attend therapy appointments a few times a week. The Department believes 15 miles, for a total 30 mile round trip, represents a definition of community that properly balances the interests at issue.

Comment 3: One attorney commented that the 90-day deadline for submitting travel reimbursement receipts was onerous because billing deadlines for claims processing had never existed before for claimants. Another attorney commented that a refusal to reimburse a claimant for failure to submit their reimbursement receipts within 90 days might be unconstitutional because the attorney believed medical providers do not have the same burden to submit requests for payment within a certain timeline.

Response 3: The Department has incorporated the travel reimbursement requirements set out in 39-71-704(1)(d), MCA, enacted in 2001, for ease of use by the workers' compensation community. The 90-day deadline is specified in statute which reads in part: "Rules adopted under subsection (1)(d)(i) must provide for submission of claims, within 90 days from the date of travel, following notification to the claimant of reimbursement rules, must provide procedures for reimbursement receipts, and must require the use of the least costly form of travel unless the travel is not suitable for the worker's medical condition." The Department believes the proposed 90-day deadline is consistent with statute and does not create an undue burden for claimants.

The Department also believes there is not an unconstitutional infirmity in the rule. Under ARM 24.29.1513, medical providers are required to submit their initial bill within 7 days and subsequent bills within 30 days of providing services. Also, treating different classes of people differently is constitutionally permissible under workers' compensation if the differentiation is rationally related to a legitimate government interest. Therefore, it is permissible to treat claimants differently than medical providers if there is a rational reason to do so. Here, the Legislature established the 90-day requirement by statute in 39-71-704, MCA. The Department

believes this requirement for claimants is rational because only claimants are in possession of their travel receipts. The rule in effect sets a workable statute of limitations for travel reimbursement, just as 39-71-601, MCA, sets the statute of limitations that entirely bars late claims for workers' compensation.

Comment 4: The Montana Self-Insurers Association and an independent insurer commented that the notice to the injured worker of the 90-day deadline should be either written by the Department or use specific language provided by the Department. The Montana State Fund commented that the Department should add language to the rule specifying that written notice may be met by the insurer providing the benefit summary published by the Department as provided in 39-71-606(2), MCA.

Response 4: As with several aspects of Montana workers' compensation, the insurer and/or claims examiner determine the best practice for their unique business. The Department believes the exact form and content of the written notice to the claimant is a decision best made by the insurer/claims examiner, in light of their processes and procedures. However, the Department does make available the Benefit Pamphlet that is, pursuant to 39-71-606, to be provided to each injured worker. This Pamphlet includes basic travel reimbursement information. The Benefit Pamphlet is updated as changes in law and court decisions mandate. The Pamphlet is available in hardcopy from the Department, and also on our website. The Department believes the existing rule language contemplates either the benefit summary or a separate written notice to the claimant, and that the decision of which form to use is a business decision best left to the insurer.

Comment 5: An independent insurer commented that the Department should expand the travel reimbursement information contained in our Benefit Pamphlet.

Response 5: The Department is evaluating the Benefit Pamphlet in light of this comment. Any changes or additions will be available in hardcopy and on our website. The Benefit Pamphlet is updated as changes in law and court decisions mandate. The Department will be happy to work with anyone seeking to improve our Benefit Pamphlet, and is providing the commenter with the opportunity to help fine-tune the pamphlet.

Comment 6: The Montana Self-Insurers Association commented that the Department should address when the written notice of the 90-day deadline to request travel reimbursement should be sent.

Response 6: The Department believes the travel reimbursement statute and rule are clear in both construction and intent, and that the language in the existing rule is sufficient. Again, insurers can determine the best practice for their unique business.

Comment 7: The Montana Self-Insurers Association commented that the Department should address what to do if the injured worker moves.

Response 7: The Department believes the travel reimbursement statutes and rules are clear in both construction and intent, and that the language in the existing rule is sufficient. To avoid burdensome administrative rules, nothing in rule or law requires multiple notices to the injured worker in the event of a move. However, if the insurer or claims examiner believes that additional notice to the injured worker would be beneficial, nothing in rule or statute prohibits such additional notice. Again, it is up to the business practices of an insurer to determine whether to discuss the ramifications of a move with an injured worker on an active claim.

Comment 8: The Montana Self-Insurers Association and the Montana Contractor Compensation Fund commented that the Department should develop a form to be submitted to insurers by injured workers for travel reimbursement, and develop the specific data to be reported.

Response 8: Because the requirement that travel reimbursement requests be submitted "on a form furnished by the insurer" is consistent with the rule covering the time periods dating back to July 1, 1989, the Department believes that most workers' compensation claims examiners in Montana have already developed their own processes and forms, in light of their own unique business practices. Therefore, the Department will not develop a form at this time. The Department will continue to check with insurers and claims examiners to keep appraised of their needs. Should the situation change, the Department will develop such a form, and make it available on the internet.

Comment 9: The Montana Self-Insurers Association commented that the claimant's residence, used for determining mileage, should be defined because of construction workers and others who typically work far from home and may establish temporary residences near their work site.

Response 9: The Department acknowledges that potential problems could arise under the current rule. However, the Department believes that while the definition of residency may at some time in the future become an issue, it is important to publish updated travel rules as soon as possible. Adding an entirely new definition under this notice would require that the rest of the rule not be adopted. The Department will consider revising the rule to address the commenter's concerns, should the lack of definition of residency become an issue, or should the issue as to temporary versus permanent residence become an issue.

Comment 10: The Montana Contractor Compensation Fund commented that travel reimbursement must be reasonable in light of the fact that many construction workers commute long distances to work. It also commented that the statutory 100 mile per month exclusion should be extended to take into consideration the distance the injured worker chooses to travel to their work site if it is more than 100 miles.

Response 10: The Department may not expand or change statutory language, only clarify and provide procedures for implementation through the rules. In this case, the statute defines reimbursement relative to the locations of a claimant's community

and their medical provider and does not include consideration of a claimant's work site. The statute also sets the 100 mile exclusion. Therefore, the change suggested by the commenter would exceed the Department's delegated rulemaking authority.

Comment 11: The Montana Self-Insurers Association and the Montana Contractor Compensation Fund commented that the travel reimbursement amounts set for state employees that are then used to reimburse workers' compensation claimants must be furnished by the Department to every payer and kept current.

Response 11: The Department has, and will continue to, provide the current mileage and lodging reimbursement rates for state employees as the rates are updated. At least annually, and more frequently if changes in state employee reimbursement make it necessary, all insurers and claims examiners are provided a written notice of the updated rates. The Department also provides this notice via email to those who request it. The Department maintains the current and historical reimbursement amounts for mileage, lodging, and meals on the internet, which can be found at http://erd.dli.state.mt.us/wecregs/travelrate.asp.

Comment 12: The Montana Self-Insurers Association commented that the Department should change the method of computing distance by substituting the nearest community with a post office for the claimant's residence, indicating it would be easier to compute the distance.

Response 12: The Department sought a definition of community that would treat claimants equally and fairly. Given the number of people that live outside established communities, the Department determined that rather than use post offices, it would be clearer to compute mileage directly from the claimant's residence to the provider location. There are several websites that are free and easy to use that allow a person to establish highway mileage when two addresses are entered. The Department does not and cannot warrant the availability, reliability, or accuracy of any of these websites, and does not endorse any specific site. And as always, the Department encourages any user to check the privacy statements of any website. These websites include, but are not limited to, AAAmaps, (which requires free registration), Google Maps, Mapquest.com, MSN Maps and Directions, and Rand McNally Maps and Directions. If the claimant disputes the claims examiner's calculations, the Department encourages the claims examiner to double-check their calculations using a physical map or other websites, to ensure the accuracy of their calculations.

Comment 13: The Montana Self-Insurers Association commented that the Department should delete the reimbursement for non-receiptable lodging. Another commenter requested we include a requirement that a receipt for lodging must be presented for reimbursement in order to prevent fraudulent requests when claimants stay with family or friends.

Response 13: Section 39-71-704, MCA, requires reimbursement be based on the rate of reimbursement to state employees. Included in the state employee

reimbursement rate is $12.00 for non-receipted lodging. Under this rule, reimbursement at $12 is allowed when a claimant stays with family or friends. Also, the requirement for reimbursement for non-receiptable facilities is consistent with the rule covering every previous time period. To clarify the amount, the Department added this information to the webpage at http://erd.dli.state.mt.us/wecregs/travelrate.asp.

Comment 14: The Montana Self-Insurers Association requested clarification of mileage reimbursement calculations. Specifically, it asked if mileage is computed one-way or round trip, and asked if the injured worker is reimbursed for the first 15 miles if the provider is more than 15 miles away.

Response 14: Section 39-71-704(1)(d)(ii)(B), MCA, requires that travel within a claimant's community is not reimbursable. At the same time, under subsection (1)(d)(ii)(C), travel to a medical provider outside the claimant's community is reimbursed. Subsection (1)(d)(ii)(A) also requires that the first 100 miles be excluded. These subsections are joined by the word "and" so the exclusions provided by each must be added together before reimbursement is allowed. Therefore, read together, the statute requires reimbursement of any roundtrips outside the claimant's community after the first 100 miles. Under the rule's definition of community, a claimant is therefore reimbursed for all travel, including the first 15 miles of travel, if the 100 mile exclusion has been met and the claimant is traveling to a medical provider out of their community. Any travel within a 15 mile radius is excluded. By using the word "radius," the rule excludes 15 miles one way (30 miles round trip) because that travel falls within the claimant's "community."

Comment 15: The Montana Self-Insurers Association commented that the wording regarding occupational disease claims prior to July 1, 2005, is awkward. It suggested alternate language. The American Insurance Association commented that the rule should clarify it generally applies to occupational disease claims arising after the repeal of the Occupational Disease Act.

Response 15: The Department agrees the language could be clearer and is amending the rule to clarify it. To clarify that the specific provision of (6) only applies to claims that fall under the now repealed Occupational Disease Act, the date of loss is included in the first sentence of the rule. The Department does not believe it is necessary to also clarify that the rule generally applies to occupational disease claims arising after July 1, 2005, because those claims are to be treated like workers' compensation claims and therefore fall under the rule. In addition, the Department is preparing another rule notice to propose to amend the rules to clarify the treatment of occupational disease claims throughout all the rules.

Comment 16: The Montana Self-Insurers Association commented that the rule should clarify that prior authorization is required for travel out of Montana, and also commented that the catch phrase should be modified to indicate this rule only addresses intrastate travel.

Response 16: The travel reimbursement rule and statute include language that specifically holds down travel costs whether in or out of Montana, such as mileage reimbursement rate, least costly form of travel, lodging and meal reimbursement rates, etc. The change proposed by the commenter may create confusion as to whether the cost containment methods in the travel rule apply to out of state travel. The Department will consider addressing the issue of prior authorization for out-of-state travel to a medical provider in a future rules notice.

Comment 17: An independent insurer commented it opposed the requirement that the insurer provide written notice to the claimant of the 90-day deadline from the date of travel to request reimbursement. The commenter stated that requiring the insurer to write the language of this notice and supply it to the claimant is tantamount to forcing an insurance company to give legal advice to a claimant.

Response 17: The Department believes the injured worker must be advised of the 90-day limitation on requesting travel reimbursement, pursuant to 39-71-704(1)(d)(ii), MCA. The Department added the requirement that the notice be in writing in response to a comment from the first hearing, as a writing is the most straightforward way to prove notice was given. The Department is aware that each insurer has their own business practices. In light of this, the Department is not mandating a specific form of notice, other than it be written. Insurers and claims examiners are free to develop their own language and procedures for providing the claimant's notice. The Department does not agree that the requirement of written notice supplied by the insurer constitutes legal advice from the insurer to the claimant because the requirement merely clarifies the statutory requirement already set out in 39-71-704, MCA.

Comment 18: An independent insurer commented that it disagreed with the proposed subsection that clarifies the obligation of the insurer to reimburse travel expenses for occupational disease evaluations ordered by the Department. The commenter argues 39-72-608, MCA, enumerates the insurer's liability, and that travel reimbursement is not included. As a result, the commenter believes that (6) violates the Department's rulemaking authority.

Response 18: The Department believes that 39-72-608, MCA, clearly establishes insurer liability for travel to Department ordered occupational disease examinations because it requires the insurer to pay for "the expense of the medical examination and the report." The Department concludes that part of the "expense" of the examination includes getting the injured worker to and from the exam. Further, the Department believes it is both prudent and practical to ensure the injured worker is able to attend the exam by reimbursing associated travel expenses. For these reasons, the Department believes (6) is within its rulemaking authority.

Comment 19: The Montana State Fund testified at hearing in support of the Department's decision to update our rules. The American Insurance Association commented that it supports the amendments and appreciates the Department's clarifications that clear up confusions among insurance providers.

Response 19: The Department acknowledges the comments.

Comment 20: The Montana State Fund commented that the Department should add language excluding travel reimbursement when the medical travel occurs coincident with the claimant's travel to and from employment.

Response 20: The Department believes the statutory language of 39-71-704(1)(d), MCA, establishes the specific parameters for travel reimbursement and thereby limits the Department's authority. The travel rule and statute already exclude local mileage and impose a 100-mile per month deductible. The Department believes that incorporating such an exclusion and consequent reduction in mileage reimbursement would be beyond the Department's statutory authority.

Comment 21: An attorney commented that the rule unfairly favors insurers, creates a procedural hurdle for claimants that defeats the self administering nature of the Workers' Compensation Act, and interferes with physicians' treatment plans by discouraging them from sending claimants to superior providers out of their community because comparable treatment is available within the community.

Response 21: The Department believes that the rule balances the interests of insurers and claimants fairly because it reflects the legislative policy of the statute. Previous to the time period covered by this rule, travel was only reimbursed if the insurer requested the travel. The Department also believes the rule does not create an unduly burdensome hurdle for claimants in submitting travel reimbursement receipts because only the claimant can actually verify their travel plans. Finally, this rule only limits a physician's ability to refer a claimant to a provider in another community if there is comparable treatment in their own community. The limitation is in conformance with the statute.

Comment 22: A number of attorneys commented that the Department should define insurer requested travel to include compliance with recommended medical treatment because insurers threaten to suspend benefits pursuant to 39-71-607, MCA, if a claimant does not comply with the recommended treatment.

Response 22: The Department's rulemaking authority is limited to implementing statute. Section 39-71-704, MCA, is explicit in defining "requested or required by the insurer" as that treatment specified in 39-71-605, MCA. Compliance with scheduled medical treatment is not included in 39-71-605, MCA. Therefore, it would be outside the Department's rulemaking authority to add to the rule as requested. However, the Department is amending the rule as indicated below to clarify that insurer requested travel only includes travel pursuant to 39-71-605, MCA.

Comment 23: A physical therapist requested the Department to include functional capacity evaluations in reimbursable travel.

Response 23: Because functional capacity evaluations are included under 39-71-605, MCA, the Department believes the rule addresses this issue already. In other words, the Department believes travel at the request of the insurer already includes functional capacity evaluations. This will also be clarified by amending the rule as discussed in the previous response.

4. After consideration of the comments, the Department has amended the rule as proposed, but with the following changes, stricken matter interlined, new matter underlined:

24.29.1409 TRAVEL EXPENSE REIMBURSEMENT (1) through (4)(a) remain as proposed.

(b) The type of travel selected must be the least costly form of travel unless the travel is not suitable for the claimant's medical condition, as certified by the claimant's physician.

(c) remains as proposed.

(i) The first 100 miles of automobile travel are excluded each month unless the insurer requested the travel pursuant to 39-71-605, MCA.

(ii) through (f)(iv) remain as proposed.

(5) Preauthorized expenses incurred for direct commercial transportation by air or ground, including rental vehicles, shall be reimbursed when no other less costly form of travel is available to the claimant, or when less costly forms of travel are not suitable to the claimant's medical condition, as certified by the claimant's physician.

(a) If a claimant chooses to use commercial transportation when a less costly form of travel suitable to the claimant's medical condition is available, as certified by the claimant's physician, reimbursement shall be made according to the rates associated with the least costly form of travel.

(6) For occupational disease claims arising prior to July 1, 2005, ~~and therefore governed by the Occupational Disease Act,~~ if liability has not been accepted on the claim and the department schedules a medical examination as provided in 39-72-602, MCA, the insurer shall reimburse the claimant for the travel expenses incurred for the examination pursuant to this rule.

(7) remains as proposed.

AUTH: 39-71-203, 39-72-203, 39-72-402, MCA
IMP: 39-71-704, 39-72-602, 39-72-608, MCA

/s/ MARK CADWALLADER
Mark Cadwallader,
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State January 13, 2006.